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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1250

VELSICOL CHEMICAL CORPORATION,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

MOTION OF THE NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

TOGETHER WITH BRIEF *AMICUS CURIAE*

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MOTION OF THE NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 42 of the Rules of this Court, the National Agricultural Chemicals Association ("NACA") moves for leave to file a brief amicus curiae in support of the Petition for a Writ of Certiorari herein. The consent of the attorneys for respondent Environmental Defense Fund was requested but has been refused.

NACA is a non-profit organization incorporated under the laws of the State of Delaware with its principal offices in Washington, D.C. Its members, which number approximately 121, are manufacturers and formulators of pest control products employed in

agricultural production. These member companies produce and sell virtually all of the technical pesticide materials (active ingredients) and a large percentage of the formulated products registered for use in the United States.

This case presents the questions of what sort of showing must be made and by whom to establish that a pesticide should be suspended from use on the grounds that it constitutes an "imminent hazard" under section 6(c) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §136d(c) (Supp. V, 1975). The resolution of these questions is of vital interest and importance to the members of NACA and to the general public because of its impact on the availability of pesticides essential to the agricultural economy. In recent years, the Administrator has suspended most of the uses of certain pesticides of major importance. Further, the determination of the existence of a rebuttable presumption against registration ("RPAR")* is the first step in proceedings that may lead to the cancellation or suspension of a registered pesticide; and to date RPARs have been issued against at least eight additional major pesticides, and many dozens more are candidates for RPAR review. In these circumstances it is apparent that NACA's members, as well as the general public, have a compelling interest in the resolution the questions presented by this litigation as they relate to the procedures by which important pesticides can be summarily suspended from use for periods of indefinite duration.

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*See 40 C.F.R. §162.11

For the foregoing reasons, the motion of NACA for leave to file a brief amicus curiae in support of the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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BRIEF FOR THE NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The National Agricultural Chemicals Association ("NACA") submits this brief in support of the Petition for a Writ of Certiorari herein by Velsicol Chemical Corporation ("Velsicol") to review the judgment of the United States Court of Appeals for the District of Columbia affirming the order of the Administrator of the Environmental Protection Agency ("EPA"), which reversed the order of the Administrative Law Judge ("ALJ").

QUESTIONS PRESENTED

1. Whether the burden of persuasion is separate and distinct from the term "burden of proof" as used in §7(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. §556(d).

2. Whether §6(c) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §136d(c) (Supp. V, 1975), is a statute which shifts the "burden of proof" to the party opposing a suspension order.

INTEREST OF AMICUS CURIAE

NACA is a non-profit organization incorporated under the laws of the State of Delaware with its principal offices in Washington, D.C. Its members, which number approximately 121, are manufacturers and formulators of pest control products employed in agricultural production. These member companies produce and sell virtually all of the technical pesticide materials (active ingredients) and a large percentage of the formulated products registered for use in the United States.

This case presents the questions of what sort of showing must be made and by whom to establish that a pesticide should be suspended from use on the grounds that it constitutes an "imminent hazard" under section 6(c) of FIFRA. The resolution of these questions is of vital interest and importance to the members of NACA and to the general public because of its impact on the availability of pesticides essential to the agricultural economy. In recent years, the Administrator has suspended most of the uses of certain pesticides of major importance.[1] Further, the determination of the

[1] This proceeding involves the propriety of the suspensions heptachlor and chlordane. Chlordane is, or at least was, "... a

[footnote continued]

existence of a rebuttable presumption against registration ("RPAR")[2] is the first step in proceedings that may lead to the cancellation or suspension of a registered pesticide; and to date RPARs have been issued against at least eight additional major pesticides,[3] and many dozens more are candidates for RPAR review.[4] In these circumstances it is apparent that NACA's members, as well as the general public, have a compelling interest in the resolution the questions presented by this litigation as they relate to the procedures by which important pesticides can be summarily suspended from use for periods of indefinite duration.

ARGUMENT

The writ of certiorari should be here granted for at least two reasons.

1. The writ should be granted to decide the question of whether the burden of persuasion is separate and distinct from the "burden of proof" as that term is used in section 7(c) of the APA. The court below held that the burden of persuasion is separate and distinct,

leading insecticide in the United States" (Pet. App. at 57). EPA previously suspended aldrin and dieldrin. Almost twelve million pounds of aldrin were used in 1972. *EDF v. EPA*, 167 U.S. App. D.C. 71, 510 F.2d 1292, 1296 n.2 (D.C. Cir. 1975).

[2] See 40 C.F.R. §162.11.

[3] BHC, 41 Fed. Reg. 46024 (Oct. 19, 1976); Chlorobenzilate, 41 Fed. Reg. 21517 (May 26, 1976); Chloroform, 41 Fed. Reg. 14588 (Apr. 6, 1976); Compound 1080 and 1081, 41 Fed. Reg. 52792 (Dec. 1, 1976); Endrin, 41 Fed. Reg. 31316 (Jul. 27, 1976); Kepone, 41 Fed. Reg. 12333 (Mar. 25, 1976); Lindane, 41 Fed. Reg. 9816 (Feb. 17, 1977); Strychnine, 41 Fed. Reg. 52810 (Dec. 1, 1976).

[4] It has recently been reported that EPA is reviewing 69 pesticides for possible RPAR candidacy. Pesticide and Toxic Chemical News, Feb. 23, 1977, at 10-12.

and that the burden of proof includes only the burden of going forward.[5] The wide applicability of the APA to federal administrative proceedings and the significance in such proceedings of the allocation of the "burden of proof" make decision of this issue a matter of very substantial importance.

NACA supports and associates itself with the arguments advanced in the Petition for a Writ of Certiorari to the effect that under the APA the proponent of a rule or order has the burden of proof, including the burden of persuasion.[6] Of particular importance in this connection are those prior drafts of the APA itself which placed upon the proponent "the burden of proceeding,"[7] and which were superseded in the final legislation by language imposing upon the proponent the "burden of proof."[8]

2. The writ should also be granted to consider the closely related question of whether section 6(c) of FIFRA shifts the "burden of proof" to the party opposing a suspension order. In this connection it must be emphasized that section 7(c) of the APA places the burden of proof upon the proponent of a rule or order "[e]xcept as otherwise provided by statute." (emphasis added). The U.S. Court of Appeals for the District of Columbia Circuit concluded below that section 6(c) of FIFRA is such a statute which provides for a shift in the burden of proof.[9] But the Court did not base its

[5]Pet. App. at 8-10.

[6]Pet. at 7-10.

[7]S. Doc. 248, 79th Cong., 2d Sess. at 11, 158 (1946).

[8]S. Doc. 248, *supra*, at 30.

[9]Although the decision below of the D.C. Circuit on this point is not in conflict with that of any other U.S. Court of Appeals, it is not likely that any other U.S. Court of Appeals

[footnote continued]

conclusion upon any statutory language; it relied instead exclusively upon legislative history.[10] It is submitted that legislative history alone cannot constitute an adequate basis for bringing a statute within the above exception to section 7(c) of the APA.

Further, because a registrant has a maximum of 10 days notice to prepare for a suspension hearing, it is obvious that a gratuitous construction of FIFRA that also imposes the "burden of proof" upon the registrant in such a hearing is unreasonable. Such a construction can only have a substantial adverse effect on the continued availability of many major pesticides. NACA supports and associates itself with the arguments to this effect which are advanced in the Petition for a Writ of Certiorari.[11]

Finally, a construction of FIFRA which places the "burden of proof" upon the registrant in a suspension hearing is all the more unreasonable in view of the holding of the court below on what constitutes an "imminent hazard" under §6(c) of FIFRA justifying suspension of a pesticide during pending cancellation proceedings. The court below held that such an "imminent hazard" had been established where only a probable showing has been made that a pesticide causes cancer not in man but in laboratory animals, without regard to the extremely limited extent of any exposure of man or the environment to the pesticide during

will construe this provision of FIFRA in the foreseeable future. This is so because, not only in the instant case but also in others, various petitions filed in different Circuits that have sought review of EPA suspension or cancellation orders have been consolidated in the D.C. Circuit. *EDF v. EPA*, 510 F.2d 1292 (D.C. Cir. 1975); *EDF v. EPA*, 489 F.2d 1247 (D.C. Cir. 1973).

[10]Pet. App. at 33-39.

[11]Pet. at 10-12.

cancellation proceedings.[12] If a pesticide can be suspended simply upon a showing that it *may* cause cancer not in man but in laboratory animals that are fed extremely high doses of the pesticide, the continued availability of many major pesticides may be gravely but groundlessly threatened.

Section 6(c) of FIFRA, 7 U.S.C. §136d(c), authorizes the Administrator to suspend the registration of a pesticide where he determines that "that action is necessary to prevent an imminent hazard . . . ." The term "imminent hazard" is defined in section 2(l), 7 U.S.C. §136(l), as (in relevant part); "a situation which exists when the continued use of a pesticide during the time required for cancellation proceeding would be likely to result in unreasonable adverse effects on the environment . . . ." The term "unreasonable adverse effects on the environment" is defined in section 2(bb), 7 U.S.C. §136(bb), to mean: "any unreasonable risk to man or the environment, taking into account the economic, social and environmental costs and benefits of the use of any pesticide."[13] Thus, the concept of "imminent hazard" depends on the concept of "unreasonable risk," which in turn depends on weighing costs and benefits.

The court below ignored this need to weigh costs and benefits. Instead it has announced that the "imminent hazard" requisite for suspension exists simply ". . . if there is *substantial likelihood* that serious harm will be experienced during the year or two required in any realistic projection of the administrative process."[14] The court cited no authority for this formulation except for

[12]Pet. App. at 12.

[13]Pet. App. at 6.

[14]Pet. App. at 9.

an unsupported dictum in one of its earlier decisions.[15] The court then stated:

> An ultimate finding in a suspension proceeding that continued use of challenged pesticides poses a "substantial likelihood of serious harm" must be supported by substantial, but not conclusive, evidence. In evaluating laboratory animals studies on heptachlor and chlordane there was sufficient "respectable scientific authority" upon which the Administrator could rely in determining that heptachlor and chlordane were carcinogenic in laboratory animals.[16]

The court below should have focused its attention on the question of whether there was substantial evidence of an "imminent hazard", rather than whether there was substantial evidence of carcinoma in laboratory animals, without regard to the extremely limited extent of any human or environmental exposure during cancellation proceedings. The court below erroneously assumed that a finding of the latter was essentially tantamount to a finding of the former.

The court reached its conclusion by misapplying EPA's "cancer principles". According to the Court:

> [T]hese principles accept the use of animal test data to evaluate human cancer risks; *consider a positive oncogenic effect in test animals as sufficient to characterize a pesticide as posing a cancer risk to man;* recognize that negative results may be explained by the limited number and sensitivity of the test animals as compared to the general human population; note that there is no scientific basis for establishing a no-effect level for carcinogens; and view the findings of benign and malignant tumors as equally significant in

[15]Pet. App. at 9, n.15.

[16]Pet. App. at 12.

> determining cancer hazard to man given the increasing evidence that many 'benign' tumors develop into cancers.[17] (emphasis added)

Although NACA disputes the validity of these "principles", the court below, in another suspension case concerning aldrin/dieldrin, upheld the "validity of extrapolation to humans from data derived from tests on animals."[18] What the court there upheld, however, was a chain of reasoning that moved from a *solid and undisputed finding of carcinogenicity in laboratory animals* to a conclusion as to a carcinogenic risk to man. Here, by contrast, there was no such finding. Here the court below held that such a finding is not necessary, and instead affirmed a determination by the Administrator that an "imminent hazard" was established simply by a probable showing that the pesticides in question were animal carcinogens. And the showing was made without regard to the extremely limited extent of any exposure of man or the environment to the pesticide during cancellation proceedings.

In the instant case, the ALJ held, as a matter of law, that a pesticide does not present an "imminent hazard" unless it is found, as a fact, that it causes cancer in some laboratory animals.[19] The ALJ declined to make any such finding. Such a finding could serve as the basis upon which a series of inferences could be made that might lead to the conclusion that there is substantial evidence of cancer risk to man, and hence that continued use of the pesticide during pending cancellation proceedings would constitute an "imminent

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[17]Pet. App. at 13.

[18]*EDF v. EPA*, 167 U.S. App. D.C. 71, 78, 510 F.2d 1292, 1299 (1975).

[19]Pet. App. at 106-107.

hazard." But without that finding, such a series of inferences is without foundation, and any ultimate conclusion of cancer risk to man is not suppoted by *substantial* evidence. The Administrator ruled to the contrary: he held, as a matter of law, that a finding that a pesticide is carcinogenic in laboratory animals is not necessary, and his decision was affirmed by the court below. That ruling is erroneous. "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

In effect, then, the court below not only has erroneously placed the burden of proof in suspension proceedings upon the registrant, but also has erroneously defined the quantum of proof required to establish that continued use of a pesticide during cancellation proceedings constitutes an "imminent hazard." Unless reversed, this holding below could have serious consequences on the continued availability of many important pesticides.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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